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OBSERVING COURT RESPONSES TO VICTIMS OF RAPE AND SEXUAL ASSAULT

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Despite years of policy reform in England and Wales, court responses to sexual violence victims remain inadequate. Much of the literature relies on interviews, is outdated by policy or ignores underlying assumptions. This study therefore observed rape and sexual assault trials, identifying underlying assumptions in the data using critical discourse analysis. The main emergent themes were: routine delays, the notion of 'rational' behaviour, extreme interpretations of 'beyond reasonable doubt' and 'burden of proof', and winning as priority. These highlight the need to move beyond focusing purely on short-term change and begin addressing the fundamental inadequacies of court responses to sexual violence victims.

Key words: courts, rape trials, sexual violence, adversarialism, victim justice, observation¹

The Criminal Justice System (CJS) in England and Wales is persistently critiqued for poor responses to rape and, despite years of policy reform, courts resist change (Brown, Hovarth, Kelly and Westmarland, 2010). Even with a plethora of good quality research on these issues, several gaps in the literature remain. For example, most studies use interviews with victims or legal personnel; but court observations, which explore actions rather than stated attitudes, are rare. In addition, the focus tends to be on identifying problematic practices rather than their underlying causes; the research that does attempt to do this is now outdated by important policy changes (see Ellison, 2001). This study therefore uses observations to explore judges and barristers treatment of rape, seeking to understand such treatment in relation to the underlying context of the English and Welsh CJS.

Existing literature, policy and practice

Common identified problems

Research highlights two main problems faced by rape victims in England and Wales: high attrition ratesⁱ and inadequate treatment. Rape conviction rates have been identified as low, for

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example in 2006/7 only 6.5 percent of reported rapes resulted in a conviction (Kelly and Lovett, 2009). Most attrition occurs at the police stage (Kelly, Lovett and Regan, 2005); however court conviction rates are also thought to be lower than expected (Brown, Hamilton and O'Neill, 2007). In 2008, only 38 percent of proceededⁱⁱ rape cases achieved convictionⁱⁱⁱ compared to 69 percent of proceeded 'violence against a person' cases in the same year (Walby, Armstrong and Strid, 2010). This is especially worrying since the difficulty of obtaining a conviction at trial is the most common justification for attrition at earlier stages (Brown *et al*, 2007; Ellison, 2000).

Other convictions rates have been suggested, for example Stern (2010) uses unofficial Crown Prosecution Service (CPS) data to argue that the jury conviction rate for rape was 58 percent in 2009. The contradictions between these conviction rates could be linked to differences in what the data includes. For example, Stern's figure includes convictions for lesser offences, seems to only refer to jury trial outcomes, and is unclear about whether or not non-adult victims are included. Stern (2010) notes that this lack of clarity and consistency is problematic and should be rectified. Regardless of debates about statistics, though, Westmarland (2008) argues that focusing only on attrition remains problematic because it removes the focus from victim treatment.

There is consistent evidence of revictimisation by the CJS (Ellison, 2007) and it is for this reason we use the term 'victim' rather than 'survivor' (see also Yancy Martin, 2005). Revictimisation has been found to occur in several ways and these are well discussed in the literature (Ellison, 2000; Jordan, 2001; Skinner and Taylor, 2009). For example, despite research indicating that victims need to feel in control (Campbell, 2008); Skinner and Taylor (2009) found they were rarely consulted on important decisions (Skinner and Taylor, 2009). Payne (2009) suggested victims are often left uninformed, despite policies 'guaranteeing' they will be kept up-to-date (see Home Office, 2005). Stern (2010) adds that victims also receive little information about what to expect from the CJS, leaving them with unrealistic expectations that cannot be met. There are several documents outlining what victims can expect, for example 'The Prosecutors'

Pledge'^{iv} (Crown Prosecution Service [CPS], 2005) and Code of Practice for Victims (Office for Criminal Justice Reform, 2005, 2009) however Payne (2009) states that victims do not know which list to use. The expectations outlined can also be problematic, for example the 'Prosecutors' Pledge' promises victims protection from 'irrelevant' attacks against their character (CPS, 2005); but the victim's interpretation of irrelevant may differ from a barrister's.

Delays and cancellations at the start of trial have also been identified as traumatic for victims (Payne, 2009). Although sentence reductions are larger when guilty pleas occur earlier in the criminal justice process, there is still a ten per cent reduction in sentence if defendants plead guilty on the day of trial (Sentencing Guidelines Council, 2007). This means the defence often risks waiting until then in the hope the victim will withdraw beforehand (Payne 2009). Victims can therefore anxiously prepare for trial only to find that it is cancelled or delayed by legal arguments. There is some good practice being identified, though; for example trials are occasionally listed to start in the afternoon so that the victim is not summoned on the first day (Payne, 2009).

Kelly, Temkin and Griffiths (2006) also suggest that despite the implementation of special measures to improve victim experiences, victims are routinely intimidated and asked about their sexual history, in order to discredit them and imply the presence of consent. This may involve the assumption that women with more sexual experience are more likely to make a false allegation, despite American research indicting evidence to the contrary (Flowe, Ebbesen and Putcha-Bhagavatula, 2007). The 1999 Youth Justice and Criminal Evidence Act restricted use of sexual history unless one of four requirements is satisfied and a written application is made pre-trial. These requirements are that the evidence is 1) relevant but does not relate to consent, or 2) relevant to proving consent and the 'sexual activity' occurred around the same time as the alleged events or 3) was too similar to the alleged events to be coincidental or 4) relates to questions raised during the victim's evidence-in-chief (Youth Justice and Criminal Evidence Act, 1999). In spite of this, the fact that the meaning of 'relevant' and 'sexual activity' is left open to judicial

interpretation means that sexual history 'evidence' remains common, mostly occurring without any application (Kelly *et al*, 2006). In addition, sexual history evidence may be used to support the defendant's reasonable belief in consent (Youth Justice and Criminal Evidence Act, 1999); which may undermine the restrictions since arguments for consent and the reasonable belief in consent are likely to be closely linked (V. Baird, *personal communication 11th December 2011*).

Attempts at improvement

Policy reform has attempted to improve CJS responses to sexual violence in England and Wales. This has involved extending the definition of rape to include marital (1991) and male rape (1994); and recognising oral rape as more than sexual assault (Sexual Offences Act, 2003). In addition, defendants are now required to show any claimed belief in consent was reasonable and the jury can assume the absence of consent in certain situations (Sexual Offences Act, 2003). These situations include fear of violence, or actual violence, against the victim or a third party; the victim being unconscious, involuntarily intoxicated or unlawfully detained; or the victim having a disability that limits their capacity to consent (Sexual Offences Act, 2003). In addition, if the defendant is found to have intentionally deceived the victim about the fundamental nature and purpose of the contact, or by impersonating someone (else) known personally to the victim; then consent cannot be possible and the defendant must be convicted (Sexual Offences Act, 2003). There has not been any systematic evaluation about how effective this has been, however research suggests it has made little different to trials (McGlynn, 2010).

Attempts at improving victim treatment include the introduction of special measures, the Code of Practice for Victims and the 2007 Sexual Violence and Abuse Action Plan (SVAAP). The Youth Justice and Criminal Evidence Act 1999 introduced special measures, including using screens, giving evidence via video link or playing the recorded police interview, removal of formal legal dress and emptying the public gallery (Home Office, 2005). Kebbell, O'Kelly and Gilchrist (2007) indicate such measures successfully reduce anxiety in victims; however others argue that delivery remains inconsistent and that some legal personnel believe juries prefer live

evidence to video evidence so such tactics may be detrimental for convictions^v (Payne, 2009; Stern, 2010). The Code of Practice for Victims (Office for Criminal Justice Reform, 2005; 2009) also attempted to improve victims' experiences by setting out a minimum standard of service they should expect. These standards include being kept updated and referred to Victim Support; although research suggests implementation is 'patchy' (Payne, 2009). The 2007 SVAAP represents a more holistic attempt at improving responses to rape; including introducing training for all prosecution barristers dealing with sexual violence cases (Home Office, 2007). Each court circuit can undertake their own training, as long as it is accredited by the CPS and/or Bar Council. It usually involves sessions about CPS expectations of prosecutors, how to prepare for trial and how to make the appropriate pre-trial applications (see Western Circuit, 2011). In addition, training can involve a psychological perspective on rape myths and information about SARCs^{vi}, intermediaries and the use of expert evidence (see Western Circuit, 2011). Finally, training can include judicial perspectives on prosecuting rape, which are likely to be influential because of the authority that judges have. Defence barristers, who are the most commonly criticised, do not always receive training, though, and training may be perceived by recipients as ineffective (Smith, 2009). Finally, improvements have also been attempted through providing judges with guidelines about directions to the jury (see Judicial Studies Board, 2010). These directions can include 'myth-busters', which highlight some of the realities of rape in a balanced and informative way so as to help jurors look beyond the common stereotypes (see Judicial Studies Board, 2010).

Large-scale Government reviews by Sara Payne (2009) and Baroness Stern (2010), concluded that policies are commendable but not fully effective. Payne's (2009) review asserted the need to tackle unrealistic expectations and delays. Stern (2010) added to Payne's comments by highlighting that victims misunderstand the role of the prosecution barrister. She therefore discussed the introduction of victims' lawyers to represent the victim as the defence barrister represents the defendant (Stern, 2010). It has been suggested that a victims' lawyer could act as an intermediary during questioning to, at least partially, address manipulation (Taslitz, 1999).

The most comprehensive form of victim's lawyer, proposed by Wilson (2005), could provide advocacy and representation throughout the whole legal process, including sentencing and compensation decisions. Legal personnel would probably try to reject this because of the perceived impingement on defendants' rights and so we may benefit from exploring the role of victim's lawyers in other countries, where the changes have been successfully brought in despite any potential objections. England and Wales are the only nations in the original 15 European Union member states not to provide victims with some sort of independent legal representation; suggesting it does not contravene access to fair trial (Raitt, 2010). The role of victim's lawyers discussed ranges from simply ensuring that sexual history evidence rules are adhered to, as in Ireland (Kelly and Lovett, 2009; Stern, 2010), to having a role comparable to defence barristers when the victim becomes an auxiliary prosecutor in Germany (Kelly and Lovett, 2009; Sanders and Jones, 2007).

The debate about these lawyers could be enhanced by looking at literature on victims' rights. Defendants' rights have traditionally been considered absolute because of their foundations in civil liberties, for example the right to fair trial is cemented in the European Convention of Human Rights (ECHR) (Londono, 2007). However, "Convention law recognises that the rights of the defendant may sometimes be circumscribed by the need to respect the rights of victims and witnesses" (Powles, 2009:328). For example, the European Court ruled that banning defendants from representing themselves in sexual violence cases in England and Wales did not impinge on fair trial (Londono, 2007). While there is not a specific set of human rights for victims, they are arguably enshrined in the ECHR (Doak, 2008). Articles 3 and 8 of the ECHR acknowledge the need to protect against degrading treatment and invasions of privacy (Londono, 2007). This requires effective laws and investigations to protect the public from crime, and protection against traumatic trial experiences (Londono, 2007). The European Court has ruled that trials do sometimes become so intimidating or intrusive as to breach Articles 3 or 8 in their own right and

so courts must try harder to ensure that procedures are less traumatic (Doak, 2008; Londono, 2007).

It could be argued that since the right to fair trial is relatively 'negotiable' while Article 3 is absolute, we should prioritise victims' rights (Londono, 2007). Despite this, defendants' rights *are* important and it seems that "no one set of rights should prevail, and both sets of rights should be afforded equal respect" (Doak, 2008:247). It therefore appears that measures, such as victim's lawyers, aiming to improve victim experiences in court have a basis in civil liberties (Raitt, 2010). Despite these arguments, the victim's lawyer did not make it into Stern's (2010) final recommendations, and was ignored by the Government response to the review (Cabinet Office, 2011:3). However, in this document Theresa May, the Home Secretary and Equalities Minister, highlighted that responses to rape are "a long-term issue that needs long-term solutions" (Cabinet Office, 2011:3). The document also recognised the need for further improvement of CJS responses to victims, with the aim "that every victim be treated with dignity" (Cabinet Office, 2011:17). This, it argues, involves ensuring "that every investigation and that prosecution be conducted thoroughly and professionally, without recourse to myths and stereotypes" (Cabinet Office, 2011). Such a response seems positive, and should be celebrated if it leads to concrete improvements. Having said that, there is a notable absence of discussion about expectations of defence barristers, and it is unclear whether the quote above refers to the general act of prosecution or merely the prosecutor not referring to myths.

Explaining policy ineffectiveness

In England and Wales, we cannot simply hope the effects of policy will eventually kick in, as countries like Australia, Canada and the US report similar problems despite implementing policies around ten years earlier (Daly and Boujourns, 2008). Research attempting to explain policy ineffectiveness has suggested causes such as a focus on efficiency and targets (Temkin, 1999) and a failure to properly monitor CJS agencies (Jordan, 2001). A lack of sanctions for falling short (Skinner and Taylor, 2009) and the inherent tension between the roles of CJS professionals and victim needs have also been suggested (Jordan, 2001; Kelly *et al*, 2006). Skinner and Taylor

(2009) also suggest it takes more time, money and effort to transform entrenched discourses and cultures than policy 'solutions' may convey. Crow and Gertz (2008) have identified court cultures at local, regional and national levels, and Ulmer and Johnson (2004) believe they influence how courts are run at least as much as formal rules. Those who do not comply with cultural 'norms' may be perceived very negatively and are often ostracised by their colleagues, since reputation appears to be highly important amongst legal personnel (Hall, 2009). In addition, these cultural norms are considered part of professional conduct and so legal personnel aiming to be successful have an incentive to follow them (see Ostrom, Hanson, Ostrom and Kleiman, 2005). One example of court culture is judicial passivity, which Ellison (2000) thought to be rife because too much intervention in trials has been grounds for successful appeal and this reflects badly on the judge. Court cultures may therefore act as barriers to policy implementation.

Rape myths are another common explanation. These stereotypes are held by both the public and CJS personnel, and result in victims being considered at least partly culpable if they are not unequivocally blameless and visibly upset (Ellison and Munro, 2009; Rose, Nadler and Clark, 2006; Temkin and Krahé, 2008). In reality, victims react differently and should never be held responsible for their rape (Temkin and Krahé, 2008). Attempts at educating legal personnel about rape myths have been identified by Stern (2010) as failing to be fully effective and having the potential to perpetuate stereotypes if not properly formulated. For example, in previous interviews with legal personnel, all commented that they had not found training useful and one stated that training taught him to be suspicious if a victim was visibly distressed (Smith, 2009). Here, training was presumably aiming to show that not all victims react the same to rape; however the barrister went away with a new stereotype about 'real' victims. Rape myths may also be perpetuated by the logic of the law, which compares cases with a hypothetical 'ideal' case (Hudson, 2002). For example, Temkin and Krahé (2008) argue that the idea of a stranger violently raping a 'virtuous' woman is often perceived as the norm against which to measure real situations. Attempts to explain low convictions rates solely with rape myths have been

problematised, though, because the number of acquaintance rapes gaining conviction is higher than expected (Lovett, Uzelac, Hovarth and Kelly, 2007) and victims of other crimes are also harshly cross-examined^{vii} (Brereton, 1997). The problems faced by sexual violence victims are therefore not solely about rape myths, and it is important to explore the context of the CJS in order to move forward (Yancy Martin, 2005).

Part of this context is that the CJS is made up of organisations, each with their own objectives and priorities. Yancy Martin (2005), a US researcher, argues that the need for legal personnel to fulfil their roles within these organisations is likely to be prioritised over any personnel empathy for the victim and so acts as a barrier to good practice. For example, she points out that the defence role requires barristers to perceive the victim as the accuser, with the defendant having every right to challenge the 'accusation'. This is linked to another part of this context, the adversarial system.

Adversarialism

Adversarial systems are "essentially combative and competitive" (Ellison, 2000:45), with advocacy manuals referring to trials as battles between 'warriors' who must 'break' and 'butcher' the witness (Wellman, 1997). Although Wellman (1997) is now 15 years old, barristers in their mid-to-late-thirties would have been educated using these principles and more recent manuals retain a sense of manipulating evidence (see Bergman and Berman-Barret, 2008). Taslitz (1999) suggests this creates 'macho adversarialism', which promotes rationality and aggression (see also Collier, 1998); encouraging routine victim degradation because the focus is on winning rather than justice (see also Ellison, 2000).

Although some victims find that the trial was better than they expected (Kebbell *et al*, 2007); barristers frequently confuse, coerce and silence victims (Taslitz, 1999). Ellison (2000) links this to questioning techniques such as extensive repetition, frequent interruption, closed questions and demanding precise recollection of peripheral details (Ellison, 2000). Other authors refer to the use of irrelevant (Heenan and McKelvie, 1997) or leading questions, undertake

'pinning out'^{viii} and gradually refine witness' comments to coincide with their argument (Kebbell *et al*, 2007). Ellison, (2000) and Smith (2009) suggest these techniques are 'justified' by barristers and judges in reference to their client's interests and judges' ability stop anything improper. However, Ellison (2001) questions the latter because protecting witnesses is often perceived as contradicting the judicial role of neutral umpire and judges tend to have biased views of what is improper since many were originally defence barristers. Improper questioning is also supposedly prevented by the various Codes of Conduct, for example that of the Bar Council^{ix}. The two most discussed aspects of the Bar Code are the need to 'promote and protect fearlessly by all proper and lawful means, his lay client's best interests' and the importance of not causing undue harm to witnesses or knowingly misleading the jury (see Bar Council, 2004; Sanders and Jones, 2007). Lees (1996) and Burton, Evans and Sanders (2007) observe that such Codes of Conduct are frequently breached without objection, though; possibly because the need to promote their client's interests is perceived as overshadowing the demand for consideration of victims. Codes alone cannot guarantee ethical behaviour; since there are always loopholes and colleagues are unlikely to become whistle-blowers (Nicholson, 2006). In order to ensure ethical behaviour, Nicholson (2006) therefore argues that barristers must develop a moral character that encourages them to behave ethically.

Alternative types of justice

The problems identified in adversarialism make it important to compare responses in inquisitorial systems in continental Europe. Inquisitorial trials do not involve juries, with judges evaluating a dossier of evidence instead (Doak, 2008). Trials are therefore perceived as official enquiries rather than battles and evidence is mostly written rather than oral because judges are trusted to ignore 'hearsay' (Tak, 2003). This is considered advantageous for victims because they do not usually attend trial, although they may be asked supplementary questions in a private, pre-trial hearing (Ellison, 2001). However, Dutch defence barristers have been accused of improper questioning during pre-trial hearings, with the examining magistrate failing to

intervene (Ellison, 2001). In addition, while countries with adversarial systems are the only countries with rape conviction rates classed as 'low'; some inquisitorial countries also have worrying success rates^x (Kelly and Lovett, 2009). This may reflect the fact that adversarial and inquisitorial systems are not as dichotomous as traditionally stated^{xi} (see Hodgson, 2008).

Current understandings of justice and how it should be achieved have also been critiqued using alternative understandings such as parallel justice and feminist jurisprudence. Parallel justice argues for a more holistic understanding that does not rely solely on the CJS. Instead, it suggests that victim justice should be addressed by a parallel system, decoupling it from offender justice (Westmarland, 2008). This is because one institution cannot provide 100 percent of victim support and a more holistic, multi-agency approach is required (Koss, 2006; Westmarland, 2008). Parallel Justice is therefore thought to provide an alternative concept of justice in which support is available regardless of what, if anything, is happening with the offender (Herman, 1999; Westmarland, 2008).

Nicholson's (2000) notion of feminist jurisprudence can also provide an alternative to current responses. She uses this concept to critique the Enlightenment tradition of legal positivism around which the CJS is currently centred. This tradition prioritises 'expert' and scientific evidence over anecdotal evidence (Kelly, 2010); which may disproportionately affect rape victims whose trials often centre on anecdotal evidence about consent. Nicholson (2000) argues this positivist focus is problematic because the law should acknowledge the nuances of reality and barristers should actively focus on an ethic of care rather than winning (see also Ellison, 2000). While Nicholson's post-positivist perspective may be controversial to some, it is with this notion of an ethic of care that we wish to critique current responses to sexual violence.

Methodology

We used qualitative court observations because the research required rich data that recognised the complexities of trial processes. Court observations do not rely on retrospective or anticipatory accounts and can explore issues that are too familiar for those being researched to

recognise (Foster, 2006). They also allow an exploration of controversial details that interviewees may omit (Sarantakos, 2005). Observations do have several limitations, though, for example personal or procedural reactivity (Robson, 2004). Several judges glanced at the researcher while speaking so her presence may have influenced them; however legal personnel are frequently observed so it is unlikely they significantly altered their actions. Our personal beliefs also inevitably influenced which details were recorded, although we actively looked for evidence of alternative perspectives to alleviate this (Darlington and Scott, 2002; Foster, 2006). Another limitation is that observations cannot explore meanings with the participants (Darlington and Scott, 2002), however our previous interviews with legal personnel explored many of these meanings.

It is a criminal offence to bring recording equipment into court (Her Majesty's Courts Service, 2009) and so the researcher made extensive notes, featuring as many direct quotes as possible. Although Lees (1996) gained access to court transcripts for her research, we did not attempt to negotiate such access because of time, financial costs, marginal possibility of success and lack of other information such as body language or voice tone. To focus the notes, we consulted existing literature and recommendations from the International Commission of Jurists (ICJ) (2002) and Legal Momentum (2005). Demographic information on those involved, the nature of the prosecution and defence cases, and details about the indictment were therefore noted (ICJ, 2002; Legal Momentum, 2005). In addition, any delays, incidents occurring between court sessions, and what was said during the trial were also written down.

Purposeful sampling was used; selecting a court based on regional court conviction rates for rape and attempted rape. These statistics are available in Appendix I and show that the Western circuit was interesting since it is the only region where conviction rates have declined since 2003. Out of these Western circuit courts, we then chose a large Crown Court in which sexual violence trials are fairly common. Within this Crown Court, trials were then selected using opportunity sampling, as the researcher attended any adult sexual violence trial that started as

soon as possible after the end of the previous trial. Six trials were observed over a three month period. Although small samples are often critiqued as being ungeneralisable, qualitative research tends to focus on analytic rather than statistical generalisation (Curtis, Gester, Smith and Washburn, 2000). This means that research explores how findings fit with wider theories rather than generating predictive rules for whole populations, making small samples less problematic (Curtis *et al*, 2000). In addition, six trials provided a lot of very rich detailed information, especially since trials tended to involve up to four days of observation. The trials were varied in the contexts and characteristics of those involved (see Appendix II for more information). Five trials involved a rape charge; however they also featured secondary charges such as sexual assault or inciting a family member to sexual conduct. The legal personnel were mostly white, middle class males, although there were some female barristers and one female judge. The victims were mostly white women, although one trial featured a white male victim with severe learning difficulties.

The research focus on critically assessing legal cultures from an explicitly post-positivist perspective meant that critical discourse analysis (CDA) was useful (van Dijk 2003). CDA explores how power is produced, legitimated and challenged in 'texts', which are social actions and images as well as written words (Fairclough, 2001). The data were therefore analysed in the context of other texts and wider discourses (Wodak, 2004) and we identified how different actors were empowered or disempowered (Fairclough, 2001), as well as any challenges to dominant discourses (van Dijk, 2003). CDA has limitations, for example distinctions between the interpretations of the researcher and the intended audience are often ignored (Paltridge, 2006). Although we attempted to interpret events with legal personnel, witnesses and the jury in mind, the interpretations presented here are ultimately our own.

Problems and Priorities: Observations on sexual violence trials

The emergent themes from the data were: routine delays, the notion of ‘rational’ behaviour, extreme interpretations of ‘beyond reasonable doubt’ and ‘burden of proof’, and winning as priority.

Routine delays

The practicalities of trial were potentially very stressful for victims, especially in relation to delays while waiting to give evidence. All six trials featured delays, ranging from one hour in T1 to over a day in T3; with the mean length of delay being four hours per trial. Most of these occurred over two days, with an average of 75 percent of delays occurring while the victim waited to give evidence. For example T4 featured almost six hours of delays, over five hours of which were while the victim was present, and in T5 all parties attended court only for the trial to be postponed. Delays occurred for multiple reasons, for example problems with special measures (T4), loss of jurors (T6) and childcare needs of both the victim and defendant^{xii} (T3; T5). The most common cause, though, was the overrunning of other cases that judges dealt with each morning before trial. Delays were referred to: “We’ve got as much chance of starting today as Murray has of winning Wimbledon” (T4 prosecution, LD^{xiii}). However these comments did not challenge the inevitability of the continual delays, suggesting that they were considered a routine aspect of trial.

There was some resistance to this, for example two judges started trials later than usual in an attempt to prevent delays:

“Shall we say 10:30. I have other cases at 10:00 that I have to deal with but I don’t want to keep you unnecessarily” (T1 judge, WT)

“Out of an abundance of caution, I shall say quarter to 11. I shall do my best, I can’t promise anything, but quarter to 11 please” (T4 judge, WT).

This is positive; however by qualifying her attempt at preventing delays with “I can’t promise anything”, the T4 judge did not wholly reject the ‘inevitability’ of delays. In addition, both trials were slightly delayed the following morning despite these attempts at prevention since even with the later start times, previous cases overran.

Resistance was also evident in T6, where the judge released a missing juror after 1.5 hours in order to protect victim welfare. Despite wanting to wait further and shoulder more delays, the judge became proactive and began the trial for the victim's sake because of his reduced attention span as a result of severe learning difficulties: "Were it not for the fact [victim] is waiting to give evidence, I would wait further... that is a luxury we cannot afford" (T6 judge, LD). However the overarching absence of proactive^{xiv} attempts at preventing or challenging delays suggests they were normal and not considered hugely problematic by the court.

Behaviour as 'rational'

There was evidence that the CJS operates within a positivist context, leading to an assumption that behaviour is 'rational'. This led to a strong focus on whether a victim's actions were 'rational', with no recognition that behaviour is often 'irrational'. Instead, failure to act 'logically' was treated as suspicious and the assumption of 'rational' decision-making was used to argue the defendant would not commit rape: "He knew that the car was traceable to him...why would he be so stupid as to go on and rape the woman that he had been seen with only moments before?" (T3 defence, WT). Actions were thus compared to hypothetical 'normal' situations based on logic:

Defence: "And you say you were looking for the police?"

Victim: "Yeah"

Defence: "But you had your phone?"

Victim: "Yeah"

Defence: "So you could have called...so why did you say you were looking for a police car?" (T3, WT)

"How come you came to be outside the club without her then? [...] Why didn't you wait for her outside the club? [...] If you were supposed to go to her house, how was that going to work?" (T1 police to victim in video interview, WT).

The latter quote is significant because it shows that witnesses were subjected to an assumption of rational behaviour during their evidence-in-chief as well as cross-examination. Having said that, one barrister did resist the notion of 'irrational' behaviour should be used against the victim: "The defence criticise her for not acting different on the night... [it is suggested she made 'bad' decisions]...but as we all know that can happen" (T1 prosecution, WT). This is a positive reminder that legal personnel cannot be treated homogenously.

On several occasions, the 'rational' norm by which actions were measured was a rape myth. Whether or not the victim had a motive to lie, their emotionality and any delayed reporting were routinely portrayed as important in assessing the victim's credibility. For example, 'rational' ideals were used to suggest that delayed reporting was suspicious, and immediate reporting was 'ideal':

"Why didn't she call the police straight away?" (T3 defence, WT).

"He went back... and told his carers^{xv} immediately" (T6 prosecution, WT)

This latter quote highlights how rape myths were not only used by defence barristers, but also referenced by the prosecution as support for the victim's credibility.

However there was some resistance to these stereotypes in T3 and T4:

"She's been criticised for not going straight to the police... experience shows that people react differently...it is not easy, members of the jury, to tell someone about it" (T3 prosecution, WT)

"Why did she not tell someone...that is a valid question...on the other hand you may think...when abuse takes place it is often hard to tell somebody...that is a comment I make" (T4 judge, WT).

In this latter quote, it was very positive to see a judge adopting one of the 'myth-busting' judicial directions outlined by the Judicial Studies Board (2010).

There was also an assumption that victim credibility could be established by whether or not there was a 'rational' motive to make false allegations. For example:

"Knowing perhaps if she can get her disciplinarian dad off the scene...then she can get back home again" (T4 defence, WT, during a trial where the defendant was the victim's father)

Prosecution: "You didn't need any extra money?"

Victim: "No"

Prosecution: "You didn't need to make a false allegation of rape" (T3, WT).

Despite not explicitly mentioning compensation in T3, the defence had checked if the victim had made a claim. Several questions were also asked about the victim's finances, with suggestions that "maybe there was a strong financial element to [the allegation]" (T3 defence, WT). The

unfounded assumption that the victim had a 'rational' incentive to lie (i.e. to get compensation) was then used to suggest her evidence could not be trusted.

Evidence was also assessed using the victim's emotionality, which refers to whether the victim was "emotional at appropriate points in appropriate ways" (T4 defence, LD). This assumes that emotional reactions can be rationally assessed and that victims will 'naturally' respond in similar ways. For example: "In relation to his later experience...[victim] was upset and agitated...does that sound like the sort of thing that [victim] might have made up, was he capable of making up" (T6 prosecution, WT). This quote shows once more that rape myths are not solely used by the defence to undermine victims, but also by prosecution barristers to support victim credibility. The usefulness of emotionality was supported by all legal personnel in most of the trials, with three judges actively directing juries to consider it in their decisions:

"This is a case that essentially is going to depend on whether you believe what a witness is telling you...it is sometimes the case, not always, but sometimes, you can be assisted in evaluating what a witness is telling you by the manner in which they give it" (T4 judge, WT).

The authority with which the three judges told the jury to use emotionality suggests that it may have been a routine part of their verdict deliberations.

Extreme interpretations of 'beyond reasonable doubt' and 'burden of proof'

In every trial, juries were directed not to convict unless several factors were present: "There are...fundamentals of law that you must appreciate...so that you can assess the evidence" (T1 judge, WT). These are central to understanding justice in the current system, since juries were told that they must acquit if any of these requirements were absent. All legal personnel including prosecution barristers mentioned these factors, especially the need to be 'beyond reasonable doubt' (BRD) and the burden of proof being on the prosecution.

In all trials, defence barristers reminded the jury not to convict unless they were sure of the truth. This was presented as the need to be 100 percent certain: "If you think there is any possibility, not probably lying or must be lying, but do you think there is ANY possibility...it's not saying to her that she's lying, it's just saying I'm not sure" (T4 defence, WT). Although a high

standard of proof is needed to protect innocent defendants, BRD only requires the absence of 'reasonable' doubt, not any doubt at all. No legal personnel ever commented on this. When viewed in the positivist context of the CJS, with its focus on empirical evidence and 'expert' proof, certainty was then presented as impossible:

"It's just saying...how can I be sure? I wasn't there at the time" (T4 defence, WT).

"You have to say to yourselves 'I simply cannot be sure' ...what the scientists are saying is that we can't be sure" (T6 defence, WT).

Since barristers are authority figures, and no challenges arose from the prosecution or judges, these interpretations are likely to be taken seriously despite not being accurate.

It was then argued that due to the burden of proof being on the prosecution, doubt about the defendant was irrelevant and *any* doubt about the victim should result in acquittal: "You just need to be able to say that she has told you the truth, the whole truth and nothing but the truth" (T3 defence, WT). While the 2003 Sexual Offences Act made the defendant accountable for proving consent, this was not mentioned, even in T3 where the victim feared violence because the defendant had a knife, and the burden remained wholly on the prosecution in all trials. The defence therefore only needed to create doubt in the victim's story rather than belief in the defendant's evidence:

"[Prosecution] poses the question 'well what was in it for her'...that question is a dangerous question because it threatens to undermine the whole basis on which you are here...the burden is on the prosecution" (T3 defence, WT)

"The law does not require the defence to come up with an explanation" (T4 prosecution, WT).

This led to a focus on the victim, with judges reinforcing such opinions. For example, judicial summaries included directions such as: "The burden of proving [the charges] rests on the prosecution throughout; it is not for [defendant] to prove his innocence" (T4 judge, WT). While the defendants were subjected to manipulation during questioning, victims therefore suffered harsher manipulation tactics and more critical evaluations of their evidence. Barristers' speeches also tended to focus on the victim, putting their actions and evidence on trial rather than the

defendant: "You have to assess the central witness in the case" (T4 prosecution, WT). One barrister tentatively resisted this, arguing that "while the defence don't have to prove anything, you have to look at the whole situation" (T4 prosecution, WT); constructing doubt about the defendant as context for decision-making.

Winning as priority

Barristers also frequently used manipulative questioning techniques to present certain evidence in certain ways, rather than gathering all the available evidence in a balanced manner. This suggests the focus of trial was on advancing their interests rather than truth-finding. All witnesses were subjected to this, but victims were especially vulnerable as they were most susceptible to criticism. Barristers primarily manipulated evidence by asking closed questions to control what information became public. Although more open questions were sometimes asked during evidence-in-chief, these tended to be about specific matters. When the defendant in T6 attempted to stray from these closed answers, the judge reminded him that:

"you're not making a speech, you're answering questions" (T6 judge, WT)

"We want to hear your answers but it's sufficient to say yes or no while [prosecution] puts his case to you" (T6 judge, WT).

Both judges and barristers therefore reinforced the idea that defendants and witnesses were not present to tell their story, but rather as a tool with which barristers could introduce the information they desired.

Barristers also manipulated the evidence using techniques like 'pinning out' (see footnote viii), leading questions, pretending not to hear answers and gradually refining answers. For example:

Defence: "It is entirely consistent that the sperm head is from [victim]"

DNA expert: "[It is] quite unlikely that you can get DNA information from a single sperm head"

Defence: "Let's put it this way, that it's certainly not inconsistent with the sperm head being [victim's]"

DNA expert: "No"

Defence: "You can't rule out that it's [victim's]"

DNA expert: "No" (T6, WT).

These tactics were used routinely, suggesting that questioning was about ensuring 'truths' are stated in such a way as to gain advantage over the other party.

In T6, there was some resistance to this as the victim had an intermediary, which is his statutory right under the Youth Justice and Criminal Evidence Act 1999 because of his learning difficulties. Her role was "to ensure [victim] understands the questions being asked and for us to understand his responses" (T6 judge, WT), for example by asking barristers to rephrase overly complicated questions. While she sometimes resisted pressure being put on the victim, for example:

Judge: "Did the man walk to the school with you?"

Victim is silent

Intermediary: "I think [victim] feels under pressure to answer" (T6, WT);

This is at the outer limits of her role, and she usually only raised issues about the technicalities of a question. For example:

Defence: "Did you have any injuries on that day?"

Victim is silent

Intermediary: "Do you know what 'injuries' is?"

Victim: "No"

Intermediary: "Did you have any bruises or marks on your body?"

Victim: "On my stomach"

Defence: "Did any of that happen?"

Intermediary: "You might need to recall what you're talking about" (T6, WT).

Evidence was not only manipulated by questioning techniques, but also by barristers focusing on irrelevant issues. Although defendants were also vulnerable to this, peripheral details were mostly discussed in relation to the victim because the interpretation of burden of proof led to a focus on victim credibility. For example, in T4 there was a great deal of questioning about the victim's unemployment which was used to portray her as lazy and draw on class stereotypes to undermine her credibility:

Defence: "I don't think you were working, were you?"

Victim: "No"

Defence: "And I don't think you were involved in caring for your [relative]?"

Victim: "No" (T4, WT).

Similar issues were discussed in T3, where the victim worked as a prostitute and was subjected to many stereotypes throughout the trial:

Defence: "Were you on benefits?"

Victim: "Yeah I was"

Defence: "And the money that you made as a sex worker, did you spend that on the drugs you've told us you took?"

Victim: "Yeah" (T3, WT).

These were used to invoke stereotypes and create an idea of 'undeserving' victims. One prosecution barrister resisted the relevance of these stereotypes, highlighting that the victim's prostitution "doesn't make her a second class victim" and so the jury should "treat her as a normal person...on an equal standing to any other person" (T3 prosecution, WT). The barrister's choice of 'treat her as a normal person' rather than 'is a normal person' may reflect underlying judgement of the victim. In general, though, barristers focused on peripheral details in order to gain strategic advantage, highlighting the focus on winning rather than justice.

Discussion

The frequent delays observed support Payne's (2009) argument that victims may experience unnecessary stress because of being left waiting to give evidence. In inquisitorial systems, victims avoid these practicalities because their written statements are usually deemed sufficient and so they do not have to attend trial (Ellison, 2001). This also means that trials primarily consider evidence gathered immediately after the offence, helping combat memory deterioration caused by a lapse of around one year between trial and reporting (Ellison, 2001).

Inquisitorial approaches may not be as advantageous as commonly suggested, though. For example, although victims are not cross-examined and may not have to attend trial (Doak, 2008); they can be questioned several times pre-trial^{xvi} (Sanders and Jones, 2007). In addition, protective measures for vulnerable witnesses are less comprehensive than in England and Wales, and any theoretical advantages can be undermined by the practice of legal personnel (Doak, 2008). This can be seen in the improper questions asked by Dutch defence barristers during pre-trial questioning, and the failure of examining magistrates to intervene (Doak, 2008; Ellison,

2001). Indeed, some argue that countries with inquisitorial systems experience similar levels of rape myths to England and Wales, for example there can still be a focus on the victims' clothing, motivation to lie and sexual history (Ellison, 2001). In addition, the focus on winning cannot be assumed to vanish simply because there is nominally a focus on finding out what happened; especially since the State is not always neutral and fair in its search for truth (Jörg, Field and Brants, 1995). It would therefore be overly optimistic to claim that rape victims are treated well in inquisitorial systems. Even if inquisitorialism was desirable, it cannot simply be imported because each CJS has a unique context that may cause inquisitorial approaches to take on a different nature in English and Welsh courts (Ellison, 2001; Taslitz, 1999).

Despite this, the existence of some research suggesting victims are better treated within inquisitorial systems makes it at least worthy of discussion. In addition, many of these problems are related to the inadequate attitudes of legal personnel rather than the fundamental structures of the CJS as in adversarialism (Doak, 2008). This may be why Taslitz (1999), a US lawyer, rejects inquisitorialism, but believes we can still learn from inquisitorial principles. These principles are currently used more than is commonly acknowledged, for example the use of pre-recorded video evidence is arguably more compatible with inquisitorial than adversarial approaches to testimony. The Children's Reporter Scheme in Scotland also currently deals with hearings involving children using similar values; with trials being like an inquiry where a lay tribunal discusses evidence with experts. This makes trials more about conversations than battles and allows greater reliance on written evidence gained pre-trial; enjoying the potential benefits of inquisitorial principles without embracing inquisitorialism. A similar approach could be developed for adult rape and sexual assault trials.

Dripps (2009) acknowledged the problem of jury trials and suggested an innovative solution that did not result in the adoption of inquisitorialism, although it arguably uses inquisitorial principles. Dripps (2009) noted that despite procedural reform to improve conviction rates; rape trials remain problematic because jurors are influenced by stereotypes

about male sexuality being naturally aggressive. As a result, Dripps (2009) argues that we should try rape cases in a specialist court without juries, instead relying on a judge or panel of lay-judges like those in a UK magistrate's court. However, both Dripp's US specialist court and UK magistrate's courts can only impose a maximum six month sentence for a single crime (Dripps, 2009). Dripps argues that this is better than nothing, as most rape trials end in acquittal. The idea of a specialist court is commendable; however the six months maximum is too much of a compromise when dealing with a serious crime like rape. In England and Wales, it may be possible to have judge-only trials without a maximum sentence of six months; however a legislative change would be needed in order to allow trial without jury.

Another option is to draw on good practice that already exists in Specialist Domestic Violence Courts. These specialist courts aim to improve information-sharing and advocacy, raising victim satisfaction and satisfaction (Cook, Burton, Robinson, and Vallely, 2004). The personnel at the courts are specially trained and used to dealing with domestic violence cases, potentially making them more likely to act with sensitivity and reject stereotypes (Cook et al, 2004). This is an important development on Dripps' (2009) argument, which assumes that legal personnel do not believe gendered stereotypes about sexual behaviour despite a multitude of research to the contrary. While domestic violence courts are overwhelmingly in Magistrates Courts and so cannot be extended to sexual violence^{xvii}, some of the provisions of Cardiff Domestic Violence Court extend to the Crown Court; which prioritises domestic violence cases, ensuring that trial listings are carefully considered and that cases are heard by experienced judges (Cook *et al*, 2004). Cook et al (2004) argued that these Crown Court provisions should be adopted in all Specialist Domestic Violence Courts, and so future research may benefit from exploring their potential benefits. In addition, while it may not be possible to use specialist courts to try rape cases without new legislation enabling Crown Court trials without juries; most of the benefits of specialist courts are about improving pre-trial hearings and this may be something that could be extended to include sexual violence.

Returning to the discussion about adversarial systems, our research supports Ellison (2001) in that emotionality is perceived as central to evaluating witnesses. This ignores the fact that people react differently and express themselves in different ways (see also Payne, 2009). Visible distress was portrayed as the 'logical' reaction to rape, which homogenised victims and placed normative judgements on certain ways of communicating. This also ignored the element of interpretation that occurs when two people communicate, meaning that a victims' emotions could be misinterpreted by legal personnel or jurors. Until the focus on emotionality as a sign of veracity is addressed, the victim's attendance at trial may continue to be considered essential and victims will remain vulnerable to the stress caused by cross-examination and routine disruptions.

The findings also highlight the positivist context of the CJS, which impacts upon understandings of how justice can be achieved. This led to the assumption that there was a single 'truth' to be uncovered and that empirical or 'scientific' evidence was the most legitimate method of finding it. The positivist context also caused a focus on 'rationality' and meant that 'truth' was established by whether or not a witness's actions conformed to a hypothetical 'logical' ideal. Victims therefore needed to defend 'irrational' actions that were deemed suspicious despite our actions being more messy and complicated than clear-cut and 'rational' (Nicholson, 2000). This makes victims more vulnerable to being discredited since these perceived irrationalities can become the focus of the defence case.

The hypothetical norms used to assess the victim's actions were often rape myths or other, class-based, stereotypes that undermined victim credibility. In life, though, people do not act rationally or consistently and rape can happen to anyone regardless of whether they are considered socially 'deviant'. While it would be easy to blame juries for believing such rape myths, the constant focus on peripheral details may cause jurors to consider issues they otherwise would not. Legal personnel are in positions of authority and their focus on such issues may indicate to jurors that this is what matters. Training legal personnel about rape myths is one possible 'solution' to this; however defence barristers used rape myths even when the

prosecution noted their non-truth. Barristers may therefore invoke stereotypes despite knowing they are false, possibly because of the longstanding adversarial focus on winning in whatever way is possible (see also Ellison, 2001). It is therefore not enough, as the 2007 SVAAP suggests, to simply train legal personnel. In addition, the focus on comparing situations with hypothetical 'rational' norms effectively makes stereotypes the yardstick by which a witness's evidence is evaluated and perpetuates their use (see also Hudson, 2002). As long as there is a focus on winning and using 'rationality' to assess witness evidence, rape myths and other stereotypes will continue to feature prominently in trials.

The findings also highlight inappropriate questioning, which may reduce the quality of evidence heard; especially when cases involve particularly vulnerable witnesses like the victim and defendant with learning difficulties in T4. Bull (2010) suggests that asking open questions and avoiding leading or suggestive questions is therefore essential (see also Kebbell and Johnson, 2000). The demeanour of the person asking the questions may also be important, since more authoritative demeanours make vulnerable witnesses less able to recall accurate information and less willing to disclose information (Bull, 2010). This makes it even more important to question witnesses in an appropriate way, ensuring that high-quality information is produced (Bull, 2010; Ellison, 2000; 2001; Kebbell and Johnson, 2000).

Legal personnel, especially defence barristers, also interpreted procedural rules in an extreme form without being challenged by judges. Reasonable doubt does not mean the absence of any doubt and the presumption of innocence does not mean that doubt about the defendant should be ignored. This was never highlighted by legal personnel, possibly due to informal rules about judicial passivity (see Ellison, 2001) or shared cultural understandings about the meanings of BRD and burden of proof. The effects of these interpretations on rape trials are not addressed in current literature, but studies show that the way in which BRD is defined can impact upon conviction rates (Wright and Hall, 2007). For example, a US study explored the effect of varying BRD definitions on mock murder trials and found that stronger definitions led to significantly

fewer convictions when evidence was 'weak' (Horowitz and Kirkpatrick, 1996). This could affect rape trials in that evidence is often considered 'weak' because trials are frequently one person's word against another. This must be explored by future research.

Extreme interpretations of the burden of proof are also important because they imply the 2003 Sexual Offences Act has not successfully made defendants more accountable for proving reasonable belief in consent. This ineffectiveness may be due to the requirements of Section 75, which states it is the defendant's responsibility to prove consent only if the prosecution proves certain factors first (see Sexual Offences Act, 2003). These factors include that the victim was unconscious or experienced actual or threatened violence. The prosecution case often hinges on such issues anyway, and so proving them before the defendant becomes accountable for proving consent effectively requires proving the case anyway. We found no academic research in relation to these issues and this must be rectified if policy effectiveness is to be improved; especially since these extreme interpretations may partially explain low conviction rates and the excessive criticism of victims.

As previously noted, barristers' priorities reflect the adversarial focus on winning (Ellison 2000). This may help explain the continued use of inappropriate questioning techniques, perpetuation of rape myths and extreme formulations of procedural rules. Adversarial principles are used to assert that judges will stop anything improper and so barristers should "fearlessly promote their client's interests" (Bar Council, 2004). However, there is literature suggesting that judges have their own biases (Crow and Gertz, 2008; Hucklesby, 1997; Rumgay, 1995) and a culture of judicial passivity is rife in English and Welsh courts (Ellison, 2000). It is therefore important to begin addressing such cultures and explore comparisons with inquisitorial systems in order to improve responses to vulnerable victims.

Concluding Remarks

This study observed trials to explore the problems faced by rape complainants in court. The emergent themes were: routine delays, prioritisation of 'rational' behaviour, extreme

interpretations of 'BRD' and 'burden of proof', and winning as priority. This contributes to the existing literature, which tends to rely on interviews and often fails to explore the adversarial context of trials. It also contributes to the wider literature on victims, since many of the findings are applicable to non-sexual violence trials. It is important to remember, though, that very vulnerable victims are likely to be disproportionately affected by common legal tactics and rape is a clear example of a crime that causes heightened vulnerability (Ellison, 2000).

There were some positive findings, for example most judges did appear to consider victims as long as this did not impact upon the usual running of trial. This supports Stern's (2010) and Yancy Martin's (2005) claims that there is reason to celebrate, yet there were also many issues requiring fundamental change. While short-term solutions such as training legal personnel about sexual history evidence (Kelly *et al*, 2006) are important, they must not distract us from radical reform. This is especially true since many short-term recommendations cannot be successful without simultaneously addressing these underlying problems. In terms of short-term change, the findings highlight several areas for immediate improvement. For example, the Listings Office should allow at least 15 minutes per case dealt with before trial, rather than the 5 or 10 minutes currently left. This would minimise delays by allowing more leeway if the prior cases run late. Trials should also start in the afternoon on the first day so that the victim is not summoned until the following morning and can avoid the delays that occur pre-trial (see also Payne, 2009).

Introducing victim's lawyers could also make immediate improvements (see also Stern, 2010). As previously stated, there needs to be more discussion about the role these lawyers should undertake. The most appropriate role would be protecting victims from inappropriate questioning and objecting to extreme interpretations of BRD or burden of proof. In terms of the practicalities of this; key questions include what the relationship between the prosecution and victims' barrister should be and what should be the consequences of a victims' lawyer's objection. Here, we do not have all the answers and hope that this article can stimulate debate about these

important issues. For example, the victims' lawyer could provide input into the prosecution's trial strategy, but the prosecutor would remain in control. They could also object to the defence line of questioning without the prosecution's permission, but not be involved in any decision-making discussions about the objection other than to briefly explain why the questions were inappropriate. These objections could only be about matters of law, for example that questions were more prejudicial than probative, and so would not change the prosecution's responses to legitimate defence arguments. In this way, the victims' lawyer could act as an 'evidentiary watchdog', much like the judge and prosecution barrister are meant to be but are not. While training judges to do this may be a more popular solution, training about other habits has not proved effective in achieving consistent change and the fear of appeal due to excessive intervention may prevent judges from speaking up^{xviii} (Ellison, 2000). Using victim's lawyers to bring these objections may therefore appease the problems faced by sexual violence victims without requiring long term cultural changes. Having said this, we acknowledge that the implementation of victim's lawyers may also require a cultural change, especially if they are expected to successfully challenge a judge.

Most importantly, fundamental change is required to shift priorities away from simply winning and onto a more balanced approach. While this may seem idealistic, existing attempts at improving the situation are not being effective and we need to be more creative in thinking what currently appears 'unthinkable'. This approach would focus on finding out what happened, the perceived truth from both sides, using processes informed by both an ethic of care for the victim and due process protection of the defendant. This is easier said than done, but some authors argue it can be achieved (Walsh and Bull, 2010). In practice this may involve changes to legal education so that the culture of winning at any cost is addressed early on. Solicitors could be encouraged to instruct barristers on the basis of their fairness as well as their case 'success' rate in terms of convictions or acquittals, ensuring that barristers adopting an ethic of care are not penalised in their career. Further research is required to establish the best way of doing this, but

it could start by including this principle in ethical codes of conduct. In addition, training for legal personnel should highlight that “a fair trial does not mean a trial which is free from all possible detriment or disadvantage to the accused” (Doak, 2008:247). The protection of defendants’ rights is often used to justify poor victim treatment, so highlighting that victim and defendant rights are not a ‘zero-sum’ game may promote the uptake of an ethic of care.

An ethic of care could also be developed by exploring the principles of inquisitorialism. Although we have already noted that inquisitorial systems are not perfect and cannot simply be imported, it would be useful to explore whether rape trials could implement similar principles; for example preventing victims from having to attend trial (if they do not want too) and so avoiding many of the problems trials cause. Most realistically, though, an ethic of care may be developed through extending some of the provisions in Specialist Domestic Violence courts to sexual violence cases. A more detailed discussion of Specialist Domestic Violence Courts is not possible in this article but it is something that must be further explored by research. While we have not provided exhaustive answers to the problems raised in this article, we hope to have initiated a useful discussion in moving responses to vulnerable victims forward.

ⁱ ‘Attrition’ here means the number of reported cases that do not reach conviction.

ⁱⁱ ‘Proceeded’ refers to the instigation of legal action, for example the Crown Prosecution Service’s decision to charge.

ⁱⁱⁱ Cases were proceeded against for rape and attempted rape.

^{iv} ‘The Prosecutors’ Pledge’ consists of ten promises made to victims to ensure they receive a minimum standard of treatment. It includes a promise to provide special measures for vulnerable witnesses, to keep victims informed, to have two-way communication between the victim and prosecutor, and to remind victims of their police statement on the day of trial (CPS, 2005).

^v Professor Cheryl Thomas has funding to undertake research into jury attitudes on special measures. This will be the first attempt at exploring the effects of video link through more than the attitudes of legal personnel.

^{vi} SARCs are Sexual Assault Referral Centres (see Lovett, Regan and Kelly, 2004).

^{vii} Having said this, sexual violence victims face different constructions of ‘deserving’ victims and ‘normal’ behaviour (Brereton, 1997). In addition, the specific trauma caused by rape arguably makes sexual violence victims more vulnerable to the effects of stereotypes and aggressive cross-examination (Ellison, 2001).

^{viii} ‘Pining out’ refers to the wa

y barristers get a witness to agree with certain facts before getting to their main argument, then arguing that this means the witness must logically agree with the barrister’s whole argument. For example, getting a witness to agree they are outgoing, then arguing this means it is suspicious that they did not tell anybody about the attack.

^{ix} The Bar Council Code of Conduct (2004) is a 368 page document outlining professional conduct for barristers in England and Wales. It covers topics such as fundamental principles that should guide their work and practical responses to situations such as disclosure of guilt, gaining and accepting instructions, and how to act at trial.

^x For example in 2006, the Portuguese conviction rate was only 12 percent (Kelly and Lovett, 2009).

^{xi} Many argue that CJSs feature elements of both inquisitorialism and adversarialism (Hodgson, 2008; Raitt, 2010) and that countries within each tradition are often homogenised, making them appear more similar than they are (Hodgson, 2008). However, these concepts are still useful for understanding the contexts of each CJS (Field, 2009).

^{xii} This is despite the fact that Witness Care Units are supposed to organise childcare arrangements for victims

^{xiii} Quotes came from a range of contexts. We have therefore marked each quote with 'LD', 'WT' or 'PC'. 'LD' stands for 'legal discussion' and refers to discussions between legal personnel that occurred in the courtroom but without the jury present. 'WT' stands for 'within trial' and refers to quotes from within the courtroom and with the jury present. Finally, 'PC' stands for 'personal communication' and refers to comments made by legal personnel directly to the researcher while the trial was in recess and without other legal personnel present.

^{xiv} Although legal personnel made comments about delays, they did so in a neutral way as if delays were inevitable. The comments were therefore basic grumbling rather than a perception of delays as a serious problem.

^{xv} In this context, carers are people responsible for the everyday care of vulnerable people, for example people with severe learning difficulties. In this case, the victim lived in a residential home for people with learning difficulties and the 'carers' being discussed were professionals who worked there.

^{xvi} Although it is worth noting that victims can also be interviewed several times by police in England and Wales (Skinner and Taylor, 2009).

^{xvii} Rape and other sexual violence cases can only be dealt with in Crown Courts.

^{xviii} There is some suggestion that judges have got better at intervening when inappropriate questions are asked, however the present research did not find evidence of judicial intervention over irrelevant questioning and there is consensus that prosecutors remain too wary of intervening over these issues.

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Appendix I

Number of defendant's proceeded against at Magistrates Court and found guilty at all courts for rape and attempted rape:

	Proceeded against						Found guilty						Conviction rate (%) ⁽¹⁾				
Region	2003	2004	2005	2006	2007		2003	2004	2005	2006	2007		2003	2004	2005	2006	2007
North East	144	120	146	141	117		32	42	32	50	51		22	35	22	35	44
North West	447	401	425	370	370		97	104	118	131	116		22	26	28	35	31
Yorkshire and Humberside	245	252	268	218	191		75	103	120	112	118		31	41	45	51	62
East Midlands	206	221	232	176	140		59	69	68	71	68		29	31	29	40	49
West Midlands	335	324	280	281	248		81	93	108	84	92		24	29	39	30	37
East of England	181	210	198	179	119		43	55	61	63	53		24	26	31	35	45
London	637	516	640	589	557		132	121	118	151	156		21	23	18	26	28
South East	291	279	348	303	299		59	67	87	96	111		20	24	25	32	37
South West	155	168	145	174	184		56	53	49	74	58		36	32	34	43	32
Wales	149	198	144	136	138		39	44	35	31	50		26	22	24	23	36
England & Wales	2,790	2,689	2,826	2,567	2,363		673	751	796	863	873		24	28	28	34	37

Statistics are for England and Wales, 2003 to 2007⁽²⁾⁽³⁾, broken down by Government Office Region.

(1) The statistics relate to persons for whom these offences were the principal offences for which they were dealt with. When a defendant was found guilty of two or more offences, the principal offences is the offence for which the heaviest penalty is imposed. Where the same disposal is imposed for two or more offences, the offence is selected for which the statutory maximum penalty is the most severe.

(2) Every effort is made to ensure that the figures presented are accurate and complete. However, it is important to note that these data have been extracted from large administrative data systems generated by the courts and police forces. As a consequence, care should be taken to ensure data collection processes and their inevitable limitations are taken into account when those data are used.

(3) Based on the proportion of those proceeded against who were found guilty.

Source: Justice Statistics Analytical Services - Ministry of Justice.
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